

**Memorandum**

To : Mr. Donald Hennessy  
Assistant Chief Counsel  
Business Taxes Appeals Review Section

Date: September 8, 1992

From : Janet Vining  
Tax Counsel

Subject: , Inc.

This case was heard by the Board on . At the hearing, the Board requested that the appeals attorney reconsider the issue of who can determine whether a substance is a hazardous waste. It is our opinion, as attorneys for the Special Taxes and Operations Department, that only the Department of Toxic Substances Control (the "Department") can make that decision, and that the determination that a substance is a "hazardous waste" also includes the determination that the substance is a "waste". In this matter, the Department has determined that the material produced by is a hazardous waste; therefore, the petition for redetermination should be denied.

, Inc. ( ) is a zinc alloyer which produces zinc ingots to the specifications of its clients. The ingot-forming process also produces zinc oxide dust, which is collected through an exhaust system in a baghouse from a furnace. The issue in this case is whether the zinc oxide dust is a hazardous waste, and thus subject to the Department's regulation and the related hazardous waste fees.

In adopting the Health and Safety Code provisions which imposed the hazardous waste fees, and the related Revenue and Taxation Code provisions that govern the Board's administration of the fee program, the Legislature clearly left to the Department the determination of which substances are hazardous wastes. Revenue and Taxation Code Sections 43001 and 43452(d) state that the Board can neither accept nor consider a petition for redetermination or claim for refund which is based on the grounds that the Department's Director "has improperly or erroneously determined that any substance is a hazardous or extremely hazardous waste." Any appeal of such a determination must instead be made to the Department's Director.

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The wisdom of the Legislature's approach is confirmed by a review of the broad authority granted the Department in the Health and Safety Code to regulate all aspects of hazardous waste management in the state. In addition, the Department is required by statute to adopt regulations listing hazardous materials and describing the tests to be used to determine whether other substances are hazardous, and the Department's budget provides for the technical resources and experience necessary to make such determinations. The administration of this regulatory program would be extremely difficult if two agencies could independently determine whether a substance was a hazardous waste and thus subject to regulation or fees. By giving only the Department that authority, the Legislature has avoided potential conflicts between the Department's regulatory program and the Board's fee administration program.

The Department has determined that the zinc oxide dust produced by \_\_\_\_\_ is a hazardous waste (see "Status Determination of \_\_\_\_\_, Incorporated", prepared by \_\_\_\_\_ based on a \_\_\_\_\_ inspection). The Board is therefore precluded by Revenue and Taxation Code Section 43001 from considering \_\_\_\_\_'s petition for redetermination to the extent it is based on the argument that the zinc oxide dust is not a hazardous waste.

Even if the Department had not classified the zinc oxide dust as a hazardous waste, it would still be inappropriate for the Board to make its own classification of the material. In the Decision and Recommendation issued by H. L. Cohen in this matter on October 23, 1991, Mr. Cohen found that the product "is not a waste because it is not a discarded or disposed-of material". He therefore found it unnecessary to determine whether the material was hazardous. We believe that the Legislature, for sound policy reasons, left the decision of what is a waste to the Department, and not the Board.

Whether a material is a waste is an integral part of the determination whether the material is a hazardous waste. The terms "hazardous waste" and "waste" are both defined in the Health and Safety Code (§§ 25117 and 25124). The current definition of "waste" in Section 25124 includes materials which are discarded by being relinquished, recycled, or considered inherently wastelike (as specified in the Department's regulations). A material is considered waste if it is recycled, or accumulated, stored, or treated before recycling, as provided in Health and Safety Code Section 25143.2.

Section 25143.2 begins by stating that recyclable materials are subject to the Department's regulation (and associated fees), unless they are exempt pursuant to a variance issued by the Department, the Department's regulations, or the remainder of Section 25143.2. The remainder of the section details circumstances in which recycled materials are exempt from regulation. The application of this complicated section to various products and processes serves to define part of the universe of substances regulated by the Department.

The danger in having the Board interpret and apply such a section is that the Board and Department may reach contrary conclusions concerning whether a particular recyclable material is a hazardous waste and thus subject to regulation and fees. The result would be chaos in both the regulatory and fee programs. For example, if the Board found that a material was not a hazardous waste, could the Department still require that the material be handled in a manner which protects the public health and safety and the environment? Would the Department be precluded from requiring the facility that handles the material to obtain an operating permit, or to register with the Department? The Department's regulatory program is funded by the hazardous waste fees, and the Department could devote resources to the regulation of a substance at the same time the Board was refusing to collect fees concerning that material. The Legislature constructed the hazardous waste regulatory and fee programs in a manner which avoids these problems: the determination of whether a material is a hazardous waste is left to the Department, and that determination must include the question whether the material is a waste.

The issue of whether a substance is a waste is more complicated than it appears at first blush. Waste is not simply material that is disposed of in a garbage can or a landfill. By the statutory definition, materials that are recycled are also waste, and such recycled materials may be valuable. One of the Department's objectives is to encourage the development of technologies that increase opportunities for recycling, and thus the utilization of recyclable materials is sure to increase. There is a subtle distinction between a waste which is recycled and a byproduct of a process which is marketable. Yet the prospect of having both the Board and the Department answer this question independently results in the same problems described above. In order for the hazardous waste regulatory program to work effectively, the Department must be the sole agency to determine whether a substance is a waste or a hazardous waste.

Mr. Donald Hennessy

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In summary, the Board is precluded from considering 's petition for redetermination because the Department has classified the zinc oxide dust produces as a hazardous waste. In addition, even if the Department had not already classified the waste, the Board would have to obtain the Department's opinion concerning whether the material is a waste or a hazardous waste before ruling on the petition.

*Janet Vining*

JV:wk

cc: Mr. Allan Stuckey  
Mr. E. V. Anderson  
Mr. Larry Augusta  
Ms. Denise F. Hoffman, Department of Toxic  
Substances Control  
Mr. , Inc.